IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sivia v. British Columbia (Superintendent of Motor Vehicles),* 2012 BCSC 1030

Date: 20120712
Docket: S112179
Registry: Vancouver

Between:

Aman Preet Sivia

Petitioner

And

British Columbia (Superintendent of Motor Vehicles) and The Attorney General of British Columbia

Respondents

- and -

Docket: 104900
Registry: Victoria

Between:

Carol Marion Beam

Petitioner

And

British Columbia (Superintendent of Motor Vehicles

Respondent

- and -

Docket: 104902
Registry: Victoria

Between:

Jamie Allen Chisholm

Petitioner

And

British Columbia (Superintendent of Motor Vehicles)

Respondent

Docket: 105189
Registry: Victoria

Between:

Scott Roberts

Petitioner

And

British Columbia (Superintendent of Motor Vehicles)

Respondent

- and -

Docket: S118664
Registry: Vancouver

Between:

Satinder Jaswal

Petitioner

And

British Columbia (Superintendent of Motor Vehicles)
Attorney General of British Columbia

Respondent

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment
In Chambers

Counsel for the Petitioner, Aman Sivia:	No appearance
Counsel for Petitioners, Carol Marion Beam, Jamie Allen Chisholm, and Scott Roberts:	Jeremy G. Carr Sacha Roudett, A/S
Counsel for Petitioner, Satinder Jaswal:	Diego Solimano
Counsel for the Respondents in all proceedings:	George H. Copley, Q.C. Robert Mullett
Place and Date of Hearing:	Vancouver, B.C. April 18-20, 2012
Place and Date of Judgment:	Vancouver, B.C. July 12, 2012

A. Background

[1] In *Sivia v. British Columbia (Superintendent of Motor Vehicles),* 2011 BCSC 1639 [*Sivia* #1], I considered arguments that certain aspects of the amendments to British Columbia's *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, which created the "Automatic" or "Immediate" Roadside Prohibition regime ("ARP regime" for the purposes of this decision), were unconstitutional. I held that the ARP regime was compliant with the Constitution from a division of powers perspective, and that it did not violate s. 11(d) of the *Charter* because it did not create an "offence" as required by that section. I also held that although there was *prima facie* a violation of s. 10(b), the regime was saved by operation of s. 1 of the *Charter*.

[2] However, I held that in certain cases, because of the lack of a meaningful way to challenge the results of the search and seizure of the roadside breath sample, the ARP regime violated s. 8 of the *Charter* and was not saved by s. 1 (at para. 16):

> I find the ARP legislation infringes s. 8 of the *Charter* in the limited circumstance where, on the basis of a search of breath by an approved roadside screening device, a 90-day license suspension as well as significant penalties and costs are imposed on motorists who allegedly blow over 0.08, without those persons being able to meaningfully challenge the results of the search. I also find that the infringement is not saved under s. 1 of the *Charter*. The Province has failed to demonstrate that it constitutes a reasonable limit on the right to be free from unreasonable search and seizure.

[3] I held that this infringement of s. 8 did not apply to searches and seizures of breath samples in the "warn" or 0.05-0.08 range (at para. 17).

[4] After hearing submissions on the correct form of the formal order that should ensue from the above decision, I clarified in *Sivia v. British Columbia (Superintendent of Motor Vehicles),* 2011 BCSC 1783 [*Sivia* #2], that the unconstitutionality of the legislation did not extend to persons who refused to provide a breath sample. Further, I held that the offending portions of the ARP regime were severable from both the regime and the broader *Motor Vehicle Act* (at para. 6 of *Sivia* #2). I declared the severed provisions of the regime to be unconstitutional and

of no force and effect in accordance with s. 52 of the *Constitution Act, 1982*, and I suspended that declaration of invalidity for six months.

[5] Because of the complexity of the legal framework surrounding constitutional remedies, the parties returned in April of this year to make submissions on this topic. This decision will address the potential remedies available to the particular petitioners who were successful, at least in part, in showing that the ARP regime, as it was, was unconstitutional. I note that since my decision on November 20, 2011, the government has amended the legislation and purports to address my findings of unconstitutionality.

[6] In this proceeding, four of the petitioners were successful in obtaining a declaration that the ARP was, in part, unconstitutional. As a result, they now seek what has been described in argument as “personal and monetary remedies”; the latter being damages, restitutionary remedies, and recovery of allegedly unlawful taxes recovered under invalid legislation. Counsel for the Province says that the petitioners, although successful, are not entitled to any monetary remedies or any other personal remedies.

Procedural Issues

[7] Counsel for the Province argues that there are procedural flaws in the petitioners’ advancement of damage claims absent a proceeding properly commenced by writ (notice of civil claim under the current Rules), oral and documentary discovery, and further evidence. However, he says that the Court could nevertheless determine the entitlement of these petitioners to the various heads of damage claimed by them. Counsel for the petitioners agrees that issues of entitlement to various heads of damages can be determined in this proceeding, and I also agree.

[8] Accordingly, I will proceed to discuss the potential entitlement of the petitioners to the various heads of relief they have claimed.

B. The Petitioners' Claims

[9] The successful four individual petitioners seek what I will refer to as personal remedies of the following nature:

(a) a declaration that the ARP regime infringes their right to be secure against unreasonable search and seizure, and is of no force and effect due to its inconsistencies with the rights and freedoms guaranteed by s. 8 of the *Charter*;

(b) an order in the nature of *certiorari* quashing each applicant petitioner's ARP, monetary penalties and vehicle impoundment;

(c) an order in the nature of *certiorari* setting aside the decision of the delegate of the Superintendent that confirmed each petitioner's ARP, corresponding monetary penalties, and vehicle impoundments.

[10] The applicants further seek monetary remedies which can be broken down as follows:

(a) restitution by way of the reimbursement of

i. administrative penalties

ii. driver's license reinstatement fees

iii. vehicle towing and storage fees

iv. cost for counselling required by the Responsible Driver's Program

v. interlock installation and maintenance fees

vi. cost for alternative transportation

vii. legal fees and disbursements for disputing the prohibitions

(b) damages for

i. loss of use of vehicle

ii. loss of income

iii. compensatory damages

iv. general damages

v. punitive damages

vi. costs.

[11] The petitioners also specifically seek removal of the interlock device from their vehicles, and removal of any reference to the issuances of an IRP/ARP from each of their driving records.

C. The Parties' Positions

[12] The four successful petitioners seek monetary and non-monetary compensatory orders for losses they say were incurred as a result of the operation of an unconstitutional law.

[13] They argue that the declaration of invalidity should be retroactive to the date of the law's passage in accordance with *Canada (Attorney General) v. Hislop*, 2007 SCC 10. The petitioners also say that in accordance with *Vancouver (City) v. Ward*, 2010 SCC 27, it would be "just and appropriate" for them to receive an award for damages under s. 24(1) of the *Charter.* In the circumstances, they say it is not appropriate to find that the Province has qualified immunity or any other defences to the repayment of any monies received from the petitioners. In addition, the petitioners say that some of the monies collected from them are recoverable either as taxes collected under an invalid law, or under principles of unjust enrichment.

[14] The Province says that the petitioners are not entitled to personal remedies in the circumstances.

[15] The normal rule, it says, is that when there is a declaration of invalidity a damage claim will not be appropriate. Moreover, not only is there no proper basis for entitlement to *Charter* damages, the declaration of invalidity of the unconstitutional part of the ARP regime should also not be retroactive. Although the Province says that if the decision is found not to be retroactive that will be a

complete answer to the petitioner's claims, even if the decision is retroactive it says there are defences to the individual claims, including *res judicata*, the *de facto* doctrine, and qualified immunity. Moreover, the Province argues that the monies collected were not "taxes" as that term is used in the jurisprudence, and a simple declaration of invalidity does not mean that they are recoverable as such. Finally, the Province says any monies collected are not recoverable under principles of unjust enrichment.

D. Facts Surrounding Each Petitioner

[16] A number of the petitioners who seek individual remedies on this application have served a significant amount of their 90 day roadside suspensions, but the balance of the suspensions have been stayed pending the determination of the issues in this petition. To put in context the remedies that the petitioners are seeking, let me deal specifically with each of the petitioners who are before me on this further application: Carol Marion Beam, Jamie Allen Chisholm, Scott Roberts, and Satinder Jaswal. Aman Sivia is not before me because his roadside suspension arose from failing to provide a breath sample; which provision of the ARP regime I found not to be unconstitutional.

Carol Beam

[17] Carol Beam received a driving prohibition under s. 215.41(3) of the *Motor Vehicle Act* for allegedly registering a "fail" on a roadside screening device and was prohibited from driving for 90 days. Her vehicle was towed and impounded for 34 days, for a total bill of $714.88 (including HST). She requested a written review of her driving prohibition at a prescribed fee of $100. On October 21, 2010 the Superintendent confirmed the driving prohibition, the monetary penalty and the impoundment. Her record for the previous five years had no restrictions, but she was advised by the Superintendent on November 3, 2010 that she was required to participate in the Ignition Interlock Program and the Responsible Driver Program. The Guardian Interlock Company arranges the ignition interlock device at an estimated cost of $1,730 per vehicle. The registration fee for the Responsible Driver

Program available through Stroh Healthcare is $985.60. She deferred her obligations under the program until her petition had been resolved. She has paid the $500 penalty and to reinstate her license was required to pay $250. She deposed that she missed six days of work with her employer at a total loss of $584.28. As a result of being prohibited from driving for 90 days, she hired a driver in order to go to work at a cost of $1,020 for his time and gas expenses. She claims she has suffered professional embarrassment and anxiety and that the total cost, including towing, the Superintendent review, monetary penalty, driving license reinstatement, loss of income, and a hired driver, totalled $6,869.16. This includes legal fees of $3,700 (including$440 filing fees) and does not include the possible referral to remedial programs.

Jamie Chisholm

[18] Jamie Chisholm received a driving prohibition under s. 215.41(3) of the *Motor Vehicle Act* for allegedly registering a "fail" on a roadside screening device on October 15, 2010, and was prohibited from driving for 90 days. He received a bill for $710 for the towing of his vehicle to the compound and impoundment for 33 days, he paid the $100 bill for the Superintendent's review, and will incur the $1,730 per vehicle fee for the Guardian Interlock Program, and the $985.60 charge for the Responsible Driver Program. Mr. Chisholm received a stay of his driving prohibition 84 days into the 90 day prohibition, and deposed that he was forced to forego 84 days of wages at a total cost of $16,500. Including lost income, towing and impound fees, the review fee, legal fees of $2,200 (including $440 filing fees), and monetary penalty and driving license reinstatement fees, but not including possible referral back to the remedial programs, Mr. Chisholm claims a loss of $19,510.

Scott Roberts

[19] On October 17, 2010, Scott Roberts received a driving prohibition under s. 215.41(3) of the *Motor Vehicle Act* for allegedly registering a "fail" on a roadside screening device. His vehicle was towed to a compound, and because he could not afford the full cost of the prescribed 30 day impoundment, his recourse, he deposed,

was to consent to its early disposal so that his vehicle was destroyed at a cost of $476.03. He estimates the vehicle was worth $5,000. He incurred, as well, the fee for the review of his driving prohibition, the registration fee of $985.60 for the Responsible Driver Program through Stroh Healthcare, and the cost of $1,730 per year per vehicle to Guardian Interlock Company for the mandatory installation and servicing of the ignition interlock device. Mr. Roberts, a truck driver for 16 years, obtained a stay after serving 80 days of the 90 day prohibition, and claims lost wages of $18,666.66, and total costs of $27,942.69, which includes towing and impoundment fees, vehicle loss, loss of income, and legal fees.

Satinder Jaswal

[20] Satinder Jaswal, owns a restaurant. On August 26, 2011 he was stopped by the police and registered a “fail” on a roadside screening device (ASD). He did not apply within the 7 day period for a review by the Superintendent, but later did apply for an extension of time. That application for an extension was denied on October 5, 2011. He says that he has incurred administrative expenses in excess of $4,000 including towing and storage fees, administrative penalties, a driver’s license reinstatement fee, the Responsible Driver Program fee, ignition interlock installation fees, as well as additional expenses in excess of $1,000 relating to alternative transportation and the cost of having extra staff in his restaurant.

E. Discussion

[21] The question of possible remedies when a law is declared unconstitutional starts with a consideration of whether the declaration of invalidity should be retroactive. In the case at bar, I must then consider whether damages are appropriate under s. 24(1), and, even if the declaration of invalidity is retroactive, whether such remedies are prohibited by other defences available to the Province. I also need to consider whether any payments made by the petitioners are recoverable as taxes under an invalid law.

Introduction

[22] In discussing whether the effect of the declaration of invalidity should be retroactive I will consider the decision of the Supreme Court of Canada in *Hislop*, *supra*, which is a good starting point for this discussion about remedies under the *Charter*. I will also discuss *Schachter v. Canada*, [1992] 2 S.C.R. 679, which discusses the issue of whether individual remedies are available in conjunction with a declaration of invalidity.

[23] Section 52 of the *Constitution Act, 1982* provides:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> (2) The Constitution of Canada includes
>
> (a) the *Canada Act 1982*, including this Act;
>
> (b) the Acts and orders referred to in the schedule; and
>
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).
>
> (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

[24] Section 24(1) of the *Charter* provides:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[25] In *Hislop*, LeBel and Rothstein JJ, for the Court, discussed the question of retrospective and prospective remedies under the *Charter*, and said (at paras. 81-82):

> 81 The Constitution empowers courts to issue constitutional remedies with *both* retroactive and prospective effects: see, e.g., *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 719. Section 24(1) of the *Charter* enables individuals who have had their *Charter* rights violated to seek redress for those past wrongs and "obtain such remedy as the court considers appropriate and just". Section 24(1) may also, in some situations, enable the claimant to recover damages, which are necessarily retroactive: *Schachter*, at pp. 725-26
>
> 82 Section 52(1) instructs courts to declare unconstitutional legislation of no force or effect. When a court issues a declaration of invalidity, it declares

> that, henceforth, the unconstitutional law cannot be enforced. The nullification of a law is thus prospective. However, s. 52(1) may also operate retroactively so far as the parties are concerned, reaching into the past to annul the effects of the unconstitutional law: see, e.g., *Miron v. Trudel*, [1995] 2 S.C.R. 418.

[26] In *Schachter*, Chief Justice Lamer for the Court discussed the availability of an individual remedy under s. 24 when there has been a declaration of invalidity, and said (at 720):

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act*, 1982. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken.

[27] Mr. Copley, counsel for the Province, suggests that the reason there is rarely an individual remedy under s. 24(1) when there is a declaration of invalidity under s. 52 is because of the protection that the legislature has under the doctrine of qualified immunity and/or the *de facto* doctrine. The foundation of these defences in the case at bar is that the acts of government and its agents that form the basis of the individual petitioners' claims for relief were, in fact, lawful at the time they were done.

[28] A case that the Province says provides some context for the statement in *Schacter* that an individual remedy is rarely available in conjunction with s. 52 of the *Constitution Act,1982,* is *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347. In *Guimond*, the respondent, who was sentenced to imprisonment for non-payment of fines and spent 49 days in jail, sought judicial authorization to start a class action for damages for the alleged Constitutional invalidity of his detention. He argued that the sentencing provisions of the Quebec *Code of Penal Procedure* infringed the Canadian *Charter of Rights*, and that he was entitled to "compensatory and moral damages" in the amount of $300 per day of imprisonment. When the

case got to the Supreme Court, in addition to the class action issues, the Court specifically addressed the substantive issue regarding the availability of such damages to the respondent in the case.

[29] Generally, damages do not lie for the passage of a law subsequently determined to be invalid. The Court in *Guimond* expressed the general rule concerning damages for a law subsequently determined to be unconstitutional (at 357-358):

> In approaching this question, it is helpful to review briefly the authorities on the liability of the Crown for damages arising from the enactment of laws subsequently determined to be unconstitutional. The general principle, that an action in tort for civil damages will not lie, was enunciated clearly in this Court's decision in *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957. In that case, the plaintiff company commenced work on certain lands on the basis of a municipal zoning by-law passed by the defendant municipality. The by-law was subsequently declared *ultra vires*, and the company sought damages against the municipality. This Court rejected the action in negligence. As Laskin J. (as he then was) reasoned for the Court, at p. 969:
>
> > In exercising [a discretionary legislative] authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach. "Invalidity is not the test of fault and it should not be the test of liability": see Davis, 3 *Administrative Law Treatise*, 1958, at p. 487.
>
> The principle was reiterated by this Court in *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42. As Delisle J.A. observed in his dissenting reasons in the court below, at p. 253 D.L.R.:
>
> > [Translation] In terms of the civil law, there is no doubt that the Crown is not negligent when it enacts a law that is subsequently declared invalid, any more than the public official who attends to its implementation. In *Central Canada Potash Co. v. Government of Saskatchewan* (1978), 88 D.L.R. (3d) 609, [1979] 1 S.C.R. 42, 6 C.C. L.T. 265, Martland J., on behalf of the court, said the following about a government official's enforcement of legislation that is subsequently held to be *ultra vires* (at p. [90 S.C.R.]):
> >
> > > In my opinion it would be unfortunate, in a federal state such as Canada, if it were to be held that a government official, charged with the enforcement of legislation, could be held to be

> guilty of intimidation because of his enforcement of the statute whenever a statute whose provisions he is under a duty to enforce is subsequently held to be *ultra vires*.

[30] However, the Court in *Guimond* noted that with the passage of the *Charter*, petitioners would not be limited to a claim under the general law. The Court discussed the qualified immunity for government officials as a means of balancing the protection of constitutional rights against the needs of effective government (at 358-359):

> Of course, with the enactment of the *Charter*, a plaintiff is not limited to an action for damages under the general law of civil liability but could, in theory, seek compensatory and punitive damages as an "appropriate and just" remedy under s. 24(1). Academic commentators have generally been of the view that the "claim of right" doctrine applies with equal force under s. 24(1). As M. L. Pilkington argued in her article on "Monetary Redress for *Charter* Infringement", in R. J. Sharpe, ed., *Charter Litigation* (1987), 307, at pp. 319-20:
>
> > In assessing whether a remedy is appropriate and just, a court must consider not only the need to implement the guarantees of the Charter, but also the need to do so without unduly interfering with the effective operation of government.
> >
> > ...
> >
> > A qualified immunity for government officials is a means of balancing the protection of constitutional rights against the needs of effective government, or, in other words, determining whether a remedy is appropriate and just in the circumstances. A government official is obliged to exercise power in good faith and to comply with "settled, indisputable" law defining constitutional rights. <u>However, if the official acts reasonably in the light of the current state of the law and it is only subsequently determined that the action was unconstitutional, there will be no liability.</u> To hold the official liable in this latter situation might "deter his willingness to execute his office with the decisiveness and judgment required by the public good".
>
> Professor Garant concludes in *Droit administratif* (3rd ed. 1991), vol. 2, at p. 487:
>
> > [Translation] It seems that there is no right to obtain a compensatory remedy from the government where the *Charter* violation results from a statute that is declared unconstitutional.
> >
> > [emphasis in original]

[31] The Court then said (at 360):

> The Divisional Court of Ontario in *Crown Trust Co. v. The Queen in right of Ontario* (1986), 26 D.L.R. (4th) 41, at pp. 48-49, applied the *de facto* doctrine to deny an action for Charter damages arising from an unconstitutional statute. As Henry J. explained:
>
> > [W]e consider the law to be clear that no cause of action exists for the conduct of the appellants as agents and representatives of the registrar when acting within the authority of the legislation in the absence of any allegation of wrongful conduct, bad faith, negligence or collateral purpose. The statutes are to be given full force and effect until set aside.

[32] The Court in *Guimond* went on to say that it was against this backdrop that the following comments of Chief Justice Lamer in *Schachter* were made: "[a]n individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act*, *1982*".

[33] *Ward*, *supra*, is the case that is relied on by the petitioners for their entitlement to personal remedies under s. 24(1) of the *Charter.* I will discuss that case later, but first let me refer to the decision of the Supreme Court of Canada in *R. v. Ferguson*, 2008 SCC 6. There, Chief Justice McLachlin explained that remedies for breaches of the *Charter* are governed by s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*. She described their different remedial purposes (at paras. 59-60):

> 59 When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. A law may be inconsistent with the *Charter* either because of its purpose or its effect: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties: *Big M*; see also P. Sankoff, "Constitutional Exemptions: Myth or Reality?" (1999-2000), 11 *N.J.C.L.* 411, at pp. 432-34; M. Rosenberg and S. Perrault, "Ifs and Buts in Charter Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada" (2002), 16 *S.C.L.R.* (2d) 375, at pp. 380-82. The jurisprudence affirming s. 52(1) as the appropriate remedy for laws that produce unconstitutional effects is based on the language chosen by the framers of the *Charter*: see *Sankoff*, at p. 438.
>
> 60 Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed

> under the authority of legal regimes which are accepted as fully constitutional: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6. The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, but of the government agent's applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1).

[34] She went on to say (at paras. 61-64):

> 61 It thus becomes apparent that ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights: *Big M*; *R. v. Edwards*, [1996] 1 S.C.R. 128. Thus this Court has repeatedly affirmed that the validity of laws is determined by s. 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under s. 24 of the *Charter*: *Schachter*; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81. We are here concerned with a *law* that is alleged to violate a *Charter* right. This suggests that s. 52(1) provides the proper remedy.
>
> 62 It is argued that s. 24(1), while normally applicable to government acts, can also be used to provide a stand-alone remedy for the unconstitutional effects of mandatory minimum sentence laws. The wording of s. 24(1) is generous enough to permit this, it is argued, conferring a discretion on judges to grant "such remedy as the court considers appropriate and just in the circumstances".
>
> ...
>
> 64 The highly discretionary language in s. 24(1), "such remedy as the court considers appropriate and just in the circumstances", is appropriate for control of unconstitutional acts. By contrast, s. 52(1) targets the unconstitutionality of laws in a direct non-discretionary way: laws are of no force or effect to the extent that they are unconstitutional.

[35] With this background, let me start by addressing the claims by the petitioners and the defences raised by the Province.

Should the Declaration of Invalidity have Retroactive Effect?

[36] The major issue to be grappled with under this topic is whether the s. 52 declaration of invalidity should have retroactive effect, although subsidiary issues concerning general remedial principles also come into play.

[37] The petitioners say that the declaration should have retroactive effect, and the Province disagrees.

Retroactivity

[38] The Supreme Court in *Hislop*, described how a judicial decision is normally retroactive and how a s. 52 declaration of invalidity can be seen to have retroactive remedial effects (at para. 82):

> [82] Section 52(1) instructs courts to declare unconstitutional legislation of no force or effect. When a court issues a declaration of invalidity, it declares that, henceforth, the unconstitutional law cannot be enforced. The nullification of a law is thus prospective. However, s. 52(1) may also operate retroactively so far as the parties are concerned, reaching into the past to annul the effects of the unconstitutional law: see, e.g., *Miron v. Trudel*, [1995] 2 S.C.R. 418.

[39] Quoting Peter Hogg, the Court went on to discuss the declaratory approach to constitutional remedies and how this approach can be seen to favour retroactive remedies under s. 52 (at para. 83):

> [83] In the words of Professor Hogg, a declaration of constitutional invalidity "involves the nullification of the law from the outset" (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 55-2 (emphasis added)). If the law was invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past.
>
> [emphasis in original]

[40] However, although the Court in *Hislop* held that retroactivity is the general rule with respect to remedies for successful litigants, it also pointed out that the general rule will not be applicable in all circumstances (at para 86):

> [86] Because courts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling: see S. Choudhry and K. Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003), 21 *S.C.L.R.* (2d) 205, at pp. 211 and 218. There is, however, an important difference between saying that judicial decisions are *generally* retroactive and that they are *necessarily* retroactive. When the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm. In those situations, it may be appropriate for the court to issue a prospective rather than a retroactive

> remedy. The question then becomes what kind of change and which conditions will justify the crafting of judicial prospective remedies.
>
> [emphasis added]

[41] The Court articulated that when a court is "declaring the law as it has existed", then it is appropriate to award a fully retroactive remedy; however, when the nature and effect of the judgment of the court represents a "substantial change in the law", fairness may dictate that the retroactive effect of the judgment be limited.

[42] One might ask why this topic must be addressed, when there are still possible defences to claims where government legislation is declared invalid. The Court in *Hislop* noted that legitimate defences available to government when it adopts an invalid law and the declaration is retroactive do not cover all circumstances(at para. 101):

> 101 A careful consideration of reliance interests is critical to this analytical process. Although legal mechanisms, such as the *de facto* doctrine, *res judicata* or the law of limitations, may mitigate the consequences of declaratory rulings in certain circumstances, they do not address every situation.

[43] The Court in *Hislop* set out a two-part test for determining whether or not a declaration of invalidity should have retroactive effect. The analysis begins with a threshold consideration of whether there has been a substantial change in the law. If that threshold test is met, the court still must consider an additional series of factors as part of an overall balancing process.

[44] At para. 99 of *Hislop*, the Court articulated circumstances when a "substantial change" can be said to have occurred:

> [99] Change in the law occurs in many ways. "Clear break with the past" catches some of its diversity. It can be best identified with those situations where, in Canadian law, the Supreme Court departs from its own jurisprudence by expressly overruling or implicitly repudiating a prior decision. Such clear situations would justify recourse to prospective remedies in a proper context. But other forms of substantial change may be as relevant, especially in constitutional adjudication, where courts must give content to broad, but previously undefined, rights, principles or norms. The definition of a yet undetermined standard or the recognition that a situation is now covered by a constitutional guarantee also often expresses a substantial change in the law. The right may have been there, but it finds an expression

> in a new or newly recognized technological or social environment. Such a legal response to these developments properly grounds the use of prospective remedies, when the appropriate circumstances are met.

[45] The Court was clear that a "substantial change" in and of itself will not be enough "to justify purely prospective remedies", and went on to describe the additional list of factors which also require consideration (at para. 100):

> [100] Although the list of such factors should not be considered as closed, some of them appear more clearly compelling. They may include reasonable or in good faith reliance by governments (*Miron*, at para. 173; *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 78), or the fairness of the limitation of the retroactivity of the remedy to the litigants. Courts ought also consider whether a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources (*Benner*, at para. 103; *Schachter*, at p. 710).

[46] In this case, the Province argues vigorously against the granting of retroactive, personal, non-monetary remedies. The argument of the Province on this point is broken down into two parts. First, it argues that this Court's decision in *Sivia* #1 represented a "substantial change in the law"; the threshold question in the *Hislop* analysis. It says that the "substantial change" arose because the decision, for the first time, recognized that provincial legislation which used the results of an approved screening device "ASD" was "a law that authorized a search and seizure" and, therefore, the decision represented "recognition that a situation is now covered by a constitutional guarantee" (*Hislop,* at para. 99). The Province posits that the case was without precedent with respect to analysing the provincial legislative scheme as working with the *Criminal Code* to create a search subject to s. 8 of the *Charter*, and that the particular analysis of "reasonableness" with respect to the search and seizure in an administrative context in the event of a "fail" reading on an ASD represented a novel approach in an area without settled authority.

[47] Second, and in recognition that something more than a "substantial change in the law" is necessary, the Province argues that each of the additional criteria enunciated in *Hislop*, namely reasonable reliance, good faith, fairness to the litigants and respect for the role of the legislature, favour a purely prospective remedy.

[48] On the other side, the petitioners argue that based on the Blackstonian view that courts only ever "discover" laws which have always been in existence, the general rule that a declaration of invalidity is to be given retroactive effect should prevail. It is their position that *Sivia* #1 applied well-established s. 8 *Charter* principles, and that the Province's claim that the decision represents a "substantial change in the law" is improperly focused on only one step in a broader s. 8 analysis. The petitioners argue that simply because this Court found that the ARP regime authorizes a search by use and reference to the results of the ASD, does not mean that the regime is "now covered by a constitutional guarantee", because this finding does not automatically determine whether a guarantee applies. They say that this Court's finding was only the first step in the s. 8 analysis, and that after making that finding, this Court still had to determine whether the regime violated s. 8; the well-established s. 8 analysis. The petitioners point out that this Court gave several examples of decisions where the taking of a breath sample by an ASD as part of a criminal investigation constituted a search and seizure under s. 8.

[49] Because, say the petitioners, the *Sivia* decision does not represent a "substantial change in the law", the *Hislop* analysis yields the result that retroactive relief should not be limited.

[50] Even if the threshold issue of "substantial change" has been satisfied, the petitioners argue that the remaining criteria articulated in *Hislop*, on balance, weigh in favour of granting retroactive relief.

Analysis

[51] Before applying the *Hislop* test to the factual scenario in the case at bar, it is important to note that although the Court in *Hislop* suggested that granting a suspended declaration of invalidity may be inconsistent with the general rule of retroactivity of relief (*Hislop,* at para. 92), I made a point in my earlier judgement that the suspension, in and of itself, was not intended to deprive anyone of an appropriate remedy (see *Sivia* #2 at para. 22). However, I did not decide at that time whether the declaration of invalidity should be retroactive or prospective.

[52] On the issue of “substantial change” I find myself in agreement with the Province. I find my ruling on November 30, 2011 qualifies as a substantial change to the law. There are a number of aspects to this conclusion.

[53] Although previous jurisprudence has held that a breath sample can be construed as a search and seizure in a criminal investigation, the use of that breath sample for provincial regulatory purposes, and the broader recognition that the provincial and federal regimes work together to create the search and seizure subject to s. 8, is, I believe, a new application of s. 8 of the *Charter* to a provincial regulatory regime.

[54] Moreover, it is my view that finding that the lack of a meaningful appeal process within the ARP regime made the regime “unreasonable” under s. 8, is part of a novel way of assessing reasonableness generally under s. 8 and, therefore, in connection with an administrative regulatory scheme, can be seen to represent a “definition of a yet undetermined standard” (*Hislop* at para. 99). For these reasons, I find that the threshold question of “substantial change” in the *Hislop* analysis has been satisfied.

[55] What then of the remaining criteria?

[56] The Court in *Hislop* emphasised that the determination of retroactivity of a constitutional remedy will be based on a balancing of the factors articulated above, and that the result will very much be determined on the facts of the particular case (at para. 107):

> [T]hese factors may pull in different directions, with some factors favouring a retroactive remedy and others favouring a purely prospective remedy. In such cases, once the "substantial change" threshold criterion is met, it may be appropriate to limit the retroactive effect of the remedy based on a balancing of these other factors. This balance must be struck on a case-by-case basis.

Reasonable Reliance and Good Faith

[57] On the point of reasonable reliance and good faith the Province points to *Buhlers v. British Columbia (Superintendent of Motor Vehicles)*, [1998] B.C.J.

No. 1242 (SC), aff'd 1999 BCCA 114, where, in the face of constitutional challenges under ss. 8, 9, 10, 11(d) and 11(h) of the *Charter,* both levels of Court upheld a provincial regime, similar to the ARP regime, which relied on the results of a roadside screening device to impose penalties on drivers. Application for leave to appeal the decision to the Supreme Court was dismissed: No. 27268 (February 24, 2000). On this basis, the Province argues that it was appropriate for the legislature to rely on the analysis in *Buhlers* in enacting substantially similar legislation. On the issue of good faith, the Province points out that as soon as the legislature became aware of the constitutional defect found by the Court, it announced that it would fix the defect with new legislation, which it has purported to do.

[58] In reply to these submissions, the petitioners argue that the legislation was, in a number of ways, without precedent, and, therefore, government's possible reliance on jurisprudence analysing other similar regimes does not equate to reasonable reliance. In support of this position and the further position that the legislation was passed in bad faith, the petitioners point to a number of passages taken from the legislative debates which talk about the new regime introducing "significant changes" and "unprecedented measures". The petitioners emphasise that articulated concerns with the regime were discussed both by the official opposition, and by the majority government.

[59] It is the position of the petitioners that the extensive discussion of the new regime in Hansard, in particular, the discussions of the seriousness of the consequences and the numerous specific constitutional concerns, shows that the government was aware of the potential unconstitutionality of the legislative regime. In the result, the petitioners argue that because of this knowledge, the government could and should have referred the proposed legislation to the courts by way of constitutional reference.

[60] It is my view that in enacting the ARP regime, the Province reasonably relied on past jurisprudence considering similar legislative schemes, and that simply because they knew of the possibility, or even likelihood, that the legislation would be

challenged in court, does not mean that there was a lack of good faith in passing it. *Buhlers*, as well as other cases cited in my earlier decision (*Sivia* #1), dealt with similar legislative regimes, and similar constitutional issues were raised in the judicial analysis of those regimes. It is also important to note that the decision of this Court in *Sivia* #1 recognized that for the most part, the ARP regime in question did pass constitutional scrutiny.

[61] On the topic of good faith, although I question the Province's argument that its stated commitment to remedy the legislation subsequent to the decision of this Court declaring it unconstitutional is a factor that can bear on the analysis of good faith in the enactment of the impugned legislation, I am unable to agree with the petitioners that if the government has knowledge of the potential for constitutional challenge, that the only options open to it are to forgo passing the legislation, or to refer it for a constitutional reference. This line of reasoning would lead to the absurd result that every time the legislature wanted to enact any legislation with controversial elements to it, it should consult the courts first. Moreover, this kind of process could seriously delay the enactment of laws, like the present regime, which are addressed at remedying pressing and serious public problems. It should not be forgotten that drinking and driving is a very serious issue, with very serious consequences and that the legislature, not the court, is in the best position to decide on the best way of addressing the issue. It simply is not feasible or realistic to refer every constitutionally questionable bill to the courts for judicial input.

[62] Furthermore, most, if not all, of the excerpts of the legislative debates cited by the petitioners raised concerns with respect to the constitutionality of provisions of the ARP regime which were ultimately upheld by this Court. Further, in one particular excerpt selected by the petitioners, the Minister responsible for introducing the legislation commented that before creating the legislation, the government "sought and relied upon the advice of those who have scrutinised closely the constitutional jurisprudence" and further that government had "sought the advice" and "relied on the jurisprudence that exists now in terms of applying the tests that a court would likely apply": British Columbia, Legislative Assembly, *Hansard* Vol. 18

No. 4, (20 May 2010) at 5607 (Hon M. de Jong). These comments, I think, are admissible for the limited purpose of showing that the government exercised some due diligence, rather than an absence of good faith in passing a law in the face of obvious constitutional difficulties.

[63] In the result, this factor weighs in favour of limiting the retroactive effect of the declaration of invalidity.

Fairness to Litigants

[64] One submission of the Province on this point is that although the regime was found to be unconstitutional, primarily because of a lack of a meaningful appeal process which could consider factors such as whether the ASD was working properly, it is important to consider that "in the absence of a wholesale malfunction of some of all of the roadside screening devices ... the overwhelming majority of drivers who blew a 'fail' were in fact a menace on the road due to the consumption of alcohol". The petitioners respond that this submission represents a "baseless allegation which cannot possibly be verified for the exact reasons which led to the determination of the unconstitutionality of the ARP legislation".

[65] On this point I am generally in agreement with the petitioners. While many drivers who blew a 'fail' may well have been over 0.08, some may not have been. A primary reason that this Court found the ARP regime unconstitutional is because there was no meaningful way to challenge the result of the ASD, therefore, it is unreasonable to conclude that these petitioners were necessarily driving while impaired at the 'fail' or 0.08 level.

[66] The Province also argues that a prospective remedy for the petitioners and the public is what constitutes the most fair outcome in the case at bar as a prospective remedy will not deny the public the protection of the legislation which the Province says is "manifestly in the public interest". The Province elaborated in oral argument that even though this proposed outcome denies the petitioners any meaningful remedy, that there are many cases in the past that have denied

retroactive application of a s. 52 declaration. The Province cites *Hislop* as authority for this point.

[67] It is my view that the considerations under this factor include whether the petitioners will be denied a meaningful remedy if a retroactive remedy is limited, and the broader potential consequence of the chilling effect on *Charter* litigation. Bringing a case to court which challenges the constitutionality of legislation affecting the public involves a large amount of time and expense. Individual petitioners expose themselves to costs and put their privacy interest to one side. Moreover, a successful challenge to this kind of legislation results in the upholding of *Charter* values for persons extending beyond the individual litigants themselves. By denying a retroactive remedy in cases like this, where a purely prospective remedy would be of little value to the successful parties, the effect may be to chill potentially beneficial litigation in the public interest.

[68] In the result, this factor weighs in favour of granting a retroactive remedy.

Respecting Parliament's Role

[69] The Court in *Hislop* decided that respect for the role of the legislature was a factor which weighed in favour of limiting the retroactive remedy in the particular case. At para. 117 of the decision the Court made the following comments with respect to the analysis under this factor:

> Achieving an appropriate balance between fairness to individual litigants and respecting the legislative role of Parliament may mean that *Charter* remedies will be directed more toward government action in the future and less toward the correction of past wrongs. In the present case, the Hislop class' claim for a retroactive remedy is tantamount to a claim for compensatory damages flowing from the underinclusiveness of the former *CPP*. Imposing that sort of liability on the government, absent bad faith, unreasonable reliance or conduct that is clearly wrong, would undermine the important balance between the protection of constitutional rights and the need for effective government that is struck by the general rule of qualified immunity. A retroactive remedy in the instant case would encroach unduly on the inherently legislative domain of the distribution of government resources and of policy making in respect of this process.

[70] The rule of qualified immunity is significant here and operates to protect government and its agents from claims when laws turn out to be invalid. The ARP law was passed in good faith and established a regime to deal, on a comprehensive basis, with the problem of drinking and driving. Imposing liability of the type sought by the petitioners in the absence of bad faith, unreasonable reliance and conduct clearly wrong would, in the case at bar, like in *Hislop*, undermine the balance between the need for effective government and the protection of constitutional rights that is also struck in this case by the application of the rule of qualified immunity. I think that the balance weighs in favour of prospectivity when government seeks to address a difficult social issue, like drinking and driving, in good faith, as it has done here.

[71] Accordingly, the last factor weighs in a modest degree against granting retroactive relief.

Conclusion on Retroactivity

[72] I have found that the threshold issue of whether there has been a substantial change in the law is met in the case at bar. Further, I have found that the first two additional *Hislop* criteria, reasonable reliance and good faith, as well as respect for the legislature's role, weigh in favour of limiting the retroactive effect of this Court's declaration of invalidity.

[73] A declaration of invalidity, if applied retroactively, will have consequences beyond these parties. I think in the circumstances, given the various factors, and the balancing that is required, the declaration of invalidity should apply prospectively.

[74] Because the declaration of invalidity is prospective, the petitioners are not entitled to the monetary and personal remedies that they seek as the law was valid at the time it applied to the petitioners and that is an answer to the petitioners' damages claims and claims for return of monies and other expenses. However, the petitioners' claims are, or at least may have been, advanced on an alternative basis, and I therefore will consider them as such.

Charter Damages

[75] Are the petitioners entitled to damages under s. 24(1) of the *Charter?*

[76] The petitioners say that there is a broad discretion under s. 24(1) to determine what is appropriate and just in the circumstances of the case, and they say that the claimant simply has to establish that the award functionally fulfills one or more of the objects of (a) compensating the claimant for loss and suffering caused by the breach; (b) vindicating the right by emphasizing its importance and the gravity of the breach; and (c) deterring state agents from committing future breaches.

[77] The petitioners' claim for damages relies essentially on *Ward*, *supra*. The case concerned the violation of Mr. Ward's *Charter* rights when he was detained, strip searched, and had his car seized without cause. The trial judge had awarded damages for the *Charter* breach and the majority of the Court of Appeal upheld that award. The Supreme Court of Canada upheld the award for damages for the strip search, but not for the seizure of Mr. Ward's car.

[78] In *Ward* the Chief Justice described the nature of *Charter* damages at the beginning of her analysis (at paras. 16-20):

> 16 Section 24(1) empowers courts of competent jurisdiction to grant "appropriate and just" remedies for *Charter* breaches. This language invites a number of observations.
>
> 17 First, the language of the grant is broad. As McIntyre J. observed, "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion": *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965. The judge of "competent jurisdiction" has broad discretion to determine what remedy is appropriate and just in the circumstances of a particular case.
>
> 18 Second, it is improper for courts to reduce this discretion by casting it in a strait-jacket of judicially prescribed conditions. To quote McIntyre J. in *Mills* once more, "[i]t is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion": *Mills*, at p. 965.
>
> 19 Third, the prohibition on cutting down the ambit of s. 24(1) does not preclude judicial clarification of when it may be "appropriate and just" to award damages. The phrase "appropriate and just" limits what remedies are available. The court's discretion, while broad, is not unfettered. What is appropriate and just will depend on the facts and circumstances of the

> particular case. Prior cases may offer guidance on what is appropriate and just in a particular situation.
>
> 20 The general considerations governing what constitutes an appropriate and just remedy under s. 24(1) were set out by Iacobucci and Arbour JJ. in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3. Briefly, an appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made: *Doucet-Boudreau*, at paras. 55-58.

[79] The Court explained the functional justification of damages and whether there are other considerations that render s. 24(1) damages inappropriate or unjust as follows (at paras. 32-34):

> 32 As discussed, the basic requirement for the award of damages to be "appropriate and just" is that the award must be functionally required to fulfill one or more of the objects of compensation, vindication of the right, or deterrence of future *Charter* breaches.
>
> 33 However, even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance.
>
> 34 A functional approach to damages under s. 24(1) means that if other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24(1) would serve no function and would not be "appropriate and just". The *Charter* entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law. Alternative remedies include private law remedies for actions for personal injury, other *Charter* remedies like declarations under s. 24(1), and remedies for actions covered by legislation permitting proceedings against the Crown.

[80] One of the countervailing considerations referred to was described as the need for good governance. In that respect, the Chief Justice said (at paras. 38-40):

> 38 Another consideration that may negate the appropriateness of s. 24(1) damages is concern for effective governance. Good governance concerns may take different forms. At one extreme, it may be argued that any award of s. 24(1) damages will always have a chilling effect on government conduct, and hence will impact negatively on good governance. The logical conclusion of this argument is that s. 24(1) damages would never be

> appropriate. Clearly, this is not what the Constitution intends. Moreover, insofar as s. 24(1) damages deter *Charter* breaches, they promote good governance. Compliance with *Charter* standards is a foundational principle of good governance.
>
> 39 In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. This was the situation in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, where the claimant sought damages for state conduct pursuant to a valid statute. The Court held that the action must be struck on the ground that duly enacted laws should be enforced until declared invalid, unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power": para. 78. The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the *Constitution Act, 1982*: *Mackin*, at para. 81.
>
> 40 The *Mackin* principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion. As Gonthier J. explained:
>
> > The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. [para. 79]
>
> [emphasis added]

[81] I emphasize the Chief Justice's comment in para. 39: "absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the *Constitution Act, 1982*".

[82] The petitioners argue that the losses suffered by the petitioners are, unlike Mr. Ward's damages, easily quantifiable as they have provided an extensive list of pecuniary losses, that vindication and deterrence may be assessed in connection with the seriousness of the breach, and that the state misconduct was serious. They refer to para. 319 of the judgment in *Sivia* #1, where I concluded that the ARP

regime that imposes prohibitions on drivers who fail at the roadside does not appropriately balance the rights of the individuals and society at large. The petitioners argue that "this government enacted an unconstitutional law that intentionally or recklessly deviated from a similar regime with a more meaningful review process". Moreover, they argue that there was serious misconduct on behalf of government which led to a serious *Charter* breach, which resulted in significant and substantial consequences to the petitioners.

[83] I disagree with each of these submissions of the petitioners, particularly with respect to the idea of state misconduct in this case. Although I ruled that the review process was inadequate, I am unable on the evidence of this case to consider the unconstitutional parts of the ARP regime to be an intentional or reckless deviation from the parts of the regime that were determined to be constitutional.

[84] Peter Hogg in, *Constitutional law of Canada,* 5th ed loose-leaf (Vol. 2 Ch. 40) (Toronto: Thomson Reuters, 2007) says (at p.40-40):

> A second consideration that could negate the appropriateness of Charter damages is "concern for effective governance". Of course, Charter damages would usually promote good governance, since they should deter Charter breaches by government. However, what the Chief Justice had in mind was the line of cases holding that no damages are available "for the harm suffered as the result of the mere enactment or application of a law that is subsequently held to be unconstitutional. Nor does s. 24(1) authorize damages for harm caused by government officials who act in good faith and without negligence under the "claim of right" of a statute subsequently held to be unconstitutional for breach of the Charter." According to McLachlin CJ in *Ward*, these doctrines are exemplary of the principle of good governance, because damages awards would "chill the exercise of policy making discretion" and deter public officials from carrying out their duties under apparently valid statutes.
>
> [footnotes omitted]

[85] Those words are applicable here. In the case at bar, the statute was lawfully passed and the actions of which the petitioners complain were actions taken in good faith under that statute. There was no misconduct or bad faith in the passing of the legislation or the conduct of the officials carrying out their duties under the legislation. It is not just and appropriate to award *Charter* damages in the

circumstances of this case and the claim for monetary damages under s. 24(1) of the *Charter* must be dismissed.

Other Monetary Claims by the Petitioners

[86] The petitioners, in alternative to their main arguments, seek monetary relief on the basis that they are entitled to a restitutionary remedy because of an invalid law passed in bad faith, because the monies recovered (in some circumstances) can be characterized as taxes pursuant to a statute that has been declared invalid, and because of the principles of unjust enrichment.

[87] These arguments involve analysis of the defence of qualified immunity and the circumstances under which taxes recovered under an invalid law are recoverable, and after careful consideration of the arguments and jurisprudence, I find that the petitioners are not entitled to monetary relief on either of these grounds.

Invalid Law Passed in Bad Faith

[88] The payments that are claimed as damages are monies paid by way of fines and payments to third parties, all pursuant to legislation that was valid at the time it was adopted.

[89] The basis of the claim is that part of the ARP regime underlying the collection of these monies has been declared unconstitutional. However, in the absence of conduct that is "clearly wrong, in bad faith or an abuse of power", the law is clear that the court will not award damages suffered as a result of the "mere enactment or application of a law that is subsequently declared to be unconstitutional": *Mackin v. New Brunswick (Minister of Finance),* 2002 SCC 13, at para. 78. This immunity was described in *Mackin* in the following way (at para. 79):

> 79 The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government.

[90] Although the petitioners acknowledge that the defence of qualified immunity exists unless the state action is clearly wrong, in bad faith or an abuse of power,

they say that bad faith is present here because the state could have fulfilled their objective in a manner that did not violate individual rights. I think that the evidence is far short of showing any such minimum threshold of gravity and that the defence of immunity for state action pursuant to a lawfully passed statute is made out.

[91] Accordingly, absent an award for damages under s. 24(1) of the *Charter* which, as I have found, is not appropriate here, the claims by the petitioners for the return of monies paid to the government (directly or through its agents) are met with the argument in *Mackin* that in the absence of bad faith, conduct that is clearly wrong, or an abuse of power, the government enjoys limited immunity and the claims of the petitioner based on a subsequent declaration of invalidity must fail.

[92] The next argument to consider is the petitioners' alternative position that the monetary payments are recoverable as an invalid tax.

The Kingstreet Issue

[93] The petitioners seek recovery of certain items recovered from the petitioners: the license fee of $250 for reinstatement of a driver's license paid to ICBC; a hearing fee of $100 for a review of an ARP paid to the Superintendent; and the amount paid to the Superintendent for the Responsible Driver Program of $880. It is those items that the petitioners say amount to an unlawful tax and argue should be repaid on the basis of *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1.

[94] In *Kingstreet*, the Province of New Brunswick had been levying a user charge on clubs that were licensed to sell alcohol. The nightclubs sued to recover the charges on the basis that they were unconstitutional. The Supreme Court of Canada rejected the argument of Crown immunity, and held that the collection of what amounted to an *ultra vires* tax was recoverable.

[95] The issue here is whether the amounts claimed are recoverable under *Kingstreet* principles. The petitioners say that they are, but the Province disagrees.

[96] Mr. Copley, for the Province, argues that although *Kingstreet* characterized the issue as to whether money paid to a public authority pursuant to *ultra vires* legislation was recoverable, the judgment as a whole shows that the intent was to only deal with unconstitutional taxes. He submits that the limitation on the application of the legal principle in *Kingstreet* was affirmed in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, and refers to Peter Maddaugh and John D. McCamus, *The Law of Restitution*, Vol. 2, loose-leaf, (consolidated June 2012)(Aurora: Canada Law Book, 2004), where the authors say (at page 22-30):

> In its recent decision in *Elder Advocates of Alberta Society v. Alberta*, the Supreme Court of Canada has asserted a very narrow reading of the scope of the *Kingstreet* doctrine. The Court has essentially limited *Kingstreet* to its facts, that is, to claims for the recovery of "taxes" paid under constitutionally *ultra vires* legislation.
>
> [footnotes omitted]

[97] I accept Mr. Copley's argument that the principles in *Kingstreet* are limited to the return of *ultra vires* taxes. Therefore, the issue to decide with respect to the Petitioners' arguments regarding restitution in the case at bar is whether certain monies collected amount to taxes, or whether they are other regulatory charges which may or may not be subject to recovery under the doctrine of unjust enrichment (*Elder Advocates* at para. 91).

[98] Mr. Copley describes the distinction between taxes, including indirect taxes, and user fees. He relies on *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, for the proposition that monies paid to government will have the indicia of taxation where the impugned charges are (at para. 15):

> 15 ... (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.

[99] While Mr. Copley, as I understand his position, concedes that the above criteria are met in the case at bar, he argues that *Eurig Estate* established another factor to distinguish between taxes and user fees, which is that there must be a "nexus ... between the quantum charged and the cost of the service provided" (at para. 21). Mr Copley points out that if such a nexus exists, a charge in the nature of

a user fee is a regulatory charge, not a tax, notwithstanding that it otherwise meets the other four indicia for taxation; in other words, it is Mr. Copley's position that the four indicia discussed in *Eurig Estate* can also be indicia of a regulatory charge.

[100] In describing the indicia of charges collected under a regulatory scheme, Mr. Copley refers to the decision of *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, where Justice Gonthier set out the indicia as follows (at para. 24):

> 24 It goes without saying that in order for charges to be imposed for regulatory purposes, or to otherwise be "necessarily incidental to a broader regulatory scheme", one must first identify a "regulatory scheme". Certain indicia have been present when this Court has found a "regulatory scheme". The factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation, or benefits from it. This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

[101] Mr. Copley argues that the relevant legislation in this case, the *Motor Vehicle Act*, *supra*, the *Insurance Vehicle Act*, R.S.B.C 1996, c. 231, and the *Insurance Corporation Act*, R.S.B.C 1996, c. 228 are all part of a regulatory scheme, and that the monies paid to the government by the petitioners are regulatory charges connected with the scheme and are not taxes. He says that there is a nexus between the charges and the service provided, in that the charges help fund the regulatory scheme. Mr. Copley points out, with reference to the affidavit of Anwar Chaudhry, Corporate Controller for the Insurance Corporation of British Columbia, that the revenues generated by the 90 day prohibition penalty and the license reinstatement fee do not exceed the cost of the regulatory scheme, nor do the fees and charges collected, in the aggregate, exceed the cost of the regulatory scheme. Therefore, he submits, *Kingstreet,* which applies to taxes under an invalid statute, has no application.

[102] To determine whether a levy is a tax or a regulatory charge requires a consideration of its pith and substance: its most important or dominant characteristic: see *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, at para. 16.

[103] In *620 Connaught*, Rothstein J. said, quoting from Gonthier J. in *Westbank*, "even if the levy has all the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme" (at para. 24).

[104] As I understood the argument of the petitioners, their only argument on this point is that there is not a nexus that is sufficiently established between the quantum charged and the cost of the service. Because there was no meaningful review of the determination of whether the petitioners actually registered a fail, they submit they do not deserve to suffer the personal and monetary consequences, and therefore that there is not a nexus established between the relationship of an alleged "fail" and a regulation of risky behaviour.

[105] I disagree. The pith and substance of the monies collected in the case at bar is clearly related to a regulatory scheme. The regulatory scheme in question is a complete and detailed code, and there is a specific regulatory purpose which seeks to affect the behaviour of individuals; that is, to promote safety on the roads and highways for all users. Furthermore, according to the evidence of Mr. Martin from the Superintendent's office concerning estimated regulatory costs, there appears to be a demonstrated relationship between the regulatory scheme and the persons being regulated.

[106] Additionally, the evidence contained in the affidavit of Anwar Chaudhry shows that the revenues generated by the 90 day prohibition penalty and the license reinstatement fee do not exceed the cost of the regulatory scheme, nor do the fees and charges collected in aggregate exceed the cost of the regulatory scheme.

[107] Accordingly, I am satisfied on the evidence that the charges in question are not taxes, but are regulatory charges.

[108] The next question, therefore, is whether such regulatory charges are recoverable under the doctrine of unjust enrichment.

Unjust Enrichment

[109] On this point, Mr. Copley argues once again that because the monies claimed to be recovered by the petitioners are not “taxes”, the claim for the return of these fees is answered by the defense of qualified immunity. Mr. Copley suggests that the government, in collecting these monies under legislation passed in good faith, is protected by qualified immunity, because the legislation was valid as of the time of collection.

[110] Pursuant to my discussion of the defense of qualified immunity above, I am satisfied that under the doctrine of unjust enrichment, the claim by the petitioners for the return of these sums is met by the defence of qualified immunity; such sums having been collected under good faith legislation, even if subsequently declared invalid.

Outstanding Suspensions, Penalties and Fines

[111] Even if the declaration of invalidity is prospective from November 30, 2011, when I originally declared certain parts of the ARP regime to be unconstitutional, or June 30, 2012, when the suspended declaration of invalidity expired, the petitioners claim they are entitled to relief from monies not yet paid or parts of suspensions not yet served.

[112] It is unnecessary for me to address the arguments of the parties on this point in any great detail because the result of my conclusion that the declaration of invalidity does not have retroactive effect is that the law was not invalid when the petitioners were subject to it.

[113] Even though some or all of the petitioners may have received a stay of proceedings temporarily suspending certain of their obligations under the ARP regime pending the outcome of this matter, the matter has now been concluded (subject to any pending judicial review applications), and the conclusion is that the

law, insofar as it was applied to the petitioners, was valid. Outstanding fees and other obligations which have yet to be paid/performed are not, by themselves, enough to give the prospective only ruling retroactive effect.

F. Summary of Decision

[114] I have found that the petitioner's argument that the declaration of invalidity under s. 52 should have retroactive effect, must fail. The decision in *Sivia* #1 that parts of the ARP regime violated s. 8 of the *Charter* and were, therefore, unconstitutional, represented a substantial change in the law as described in *Hislop*. Further, the additional *Hislop* factors, on balance, weigh in favour of a prospective only application of the declaration.

[115] Although the prospective declaration of invalidity answers the majority of the petitioner's additional or alternative claims, I have further found that even when assessed independently, the petitioner's additional or alternative claims must also fail.

[116] With respect to the petitioners' contention that they are entitled to Charter damages under s. 24(1), I have found that it would not be "appropriate and just" to order such damages as the government, in adopting the ARP regime and applying it to the petitioners and collecting monies from them, did not engage in any misconduct or bad faith actions.

[117] With respect to the arguments that the monies were collected under an invalid law enacted in bad faith, and with respect to the claim for restitution of the monies collected on the basis of the principle of unjust enrichment, I have found that the doctrine of qualified immunity provides a complete defence to both of these claims.

[118] With respect to the argument that certain of the monies collected represent taxes which were unlawfully collected, I have found that those monies are regulatory charges, not taxes, and are not recoverable under the *Kingstreet* decision.

[119] Finally, I have found that as a result of the prospective only application of the declaration of invalidity, any petitioner with any outstanding fees, penalties or suspensions is still subject to paying/serving such fees, penalties, and/or suspensions.

[120] For these reasons, I have concluded that the petitioners are not entitled to the personal and monetary remedies that they seek. The parties may arrange to appear before me to discuss the issue of costs, or if they agree, they may file written submissions on that issue.

"J.S. Sigurdson J."
The Honourable Mr. Justice J.S. Sigurdson